

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

VOUTY THOL,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

Case No. C05-5373RJB-KLS

ORDER AFFIRMING
MAGISTRATE JUDGE
STROMBOM'S ORDER
DENYING MOTION TO
EXPAND THE RECORD

This matter comes before the court on Petitioner's Objection to Magistrate's Report (Dkt. 22). The court has considered the pleadings filed in support of and the motion and the file herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Vouty Thol is a prisoner at the Stafford Creek Corrections Center and has filed a petition for a writ of habeas corpus. Dkt. 5. Mr. Thol filed a Motion to Expand the Record. Dkt. 16. The motion was denied on the grounds that Mr. Thol has not raised the claim of actual innocence in his past conviction appeals and that such a claim is not grounds for federal habeas relief. Dkt. 20. The plaintiff now files objections under Federal Rule 72(a) to the denial of his motion, contending that he should be allowed to expand the record to include affidavits of witnesses alleging that Mr. Thol was unaware and uninvolved in the attempted murder for which he has been convicted. Dkt. 22.

II. DISCUSSION

Federal Rule 72(a) allows parties to object to orders issued by magistrate judges on nondispositive matters within 10 days of being served with a copy of the order. Fed. R. Civ. Pro. 72(a). Such objections are considered by the district judge, who may modify or set aside any portion of the order that is found to be clearly erroneous or contrary to the law. *Id.*

A habeas petitioner is allowed to develop the factual record if the claim relies upon a factual predicate that the prisoner could not have previously discovered with due diligence and “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 48 U.S.C. §2254. Such evidence, however, must pertain to the constitutionality of the prisoner’s detention and not merely to the petitioner’s guilt or innocence. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Magistrate Judge Strombom properly determined that development of the record to include evidence relevant only to the petitioner’s claim of actual innocence would be inappropriate, as the role of a federal court reviewing a habeas petition is to determine whether the petitioner’s confinement is unconstitutional and not to weigh the evidence. *Id.* at 400-01. Moreover, Mr. Thol has not exhausted his claim of actual innocence. *See* Dkt. 5 at 3-4, 6. The court should therefore overrule Mr. Thol’s objections and affirm Magistrate Judge Strombom.

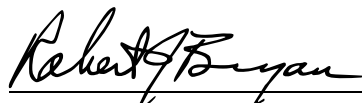
III. ORDER

Therefore, it is hereby

ORDERED that Petitioner’s Objection to Magistrate’s Report (Dkt. 22) is **OVERRULED** and Magistrate Judge Strombom’s Order (Dkt. 20) is **AFFIRMED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party’s last known address.

DATED this 13th day of December, 2005.


Robert J. Bryan
U.S. District Judge